No. 80-2154

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ZENITH RADIO CORPORATION, et al.,
Petitioners,

vs.

ROBERT EDWARD McGRATH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

D. KENDALL GRIFFITH,
WILLIAM J. HOLLOWAY,
MICHAEL J. LEECH,
69 West Washington Street
Chicago, IL 60602
(312) 630-4400
Hinshaw, Culbertson, Moelmann,
Hoban & Fuller

FRANK M. BRADY,
MARK T. DUNN,
600 Peoples Bank Building
Bloomington, IL 61701
(309)828-6241
Dunn, Brady, Ulbrich, Morel,
Kombrink & Hundman
Attorneys for Robert Edward McGrath, Plaintiff-Respondent

Pandick Press Midwest, Inc. Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
Summary of Reasons for Not Granting the Writ	1
Statement of the Case	2
Reasons for Not Granting the Writ	6
I. The only substantive points raised by petitioners are not dispositive and a decision favorable to petitioners on those points would not require a reversal	6
II. The Court of Appeals correctly indicated that the federal securities laws are applicable to this transaction.	7
III. A substantial federal question exists and the lower courts properly exercised pendant jurisdiction.	12
IV. The Standard for reviewing general verdicts cannot be resolved on the facts of this case.	14
Conclusion	16

TABLE OF AUTHORITIES

Cases

PAGE

A. J. White & Co. vs. *S.E.C.*, 556 F. 2d 619 (1st Cir. 1977), cert. den. 434 U. S. 969, 54 L. Ed. 2d 457, 98 S. Ct. 516 8

Adickes vs. *S. H. Kress & Company*, 398 U. S. 144 (1940) 8

Birnbaum vs. *Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir.), cert. denied 343 U. S. 956 (1952) 10

Blue Chip Stamps vs. *Manor Drug Stores*, 421 U. S. 723 (1975) 9

Bula vs. *Mansfield*, CCH Fed. Sec. L. Rep. Para 96,964 (D. Colo. 1977) 11

Chandler vs. *Kew, Inc.*, CCH Fed. Sec. L. Rep. Para. 96,966 (10th Cir. 1977) 11

Dixson vs. *Newsweek, Inc.* 562 F. 2d 626 (10th Cir. 1977) 14

Fredriksen vs. *Poloway*, 637 F. 2d 1147 (7th Cir.), cert. denied, ____ U. S. ____, 49 U.S.L.W. 3882 (May 26, 1981) 11

Hagans vs. *Levine*, 415 U. S. 528 (1974) 12

Hanraty vs. *Ostertag*, 470 F. 2d 1069 (10th Cir. 1973) 14

Hidell vs. *International Diversified Investments*, 520 F. 2d 529 (7th Cir. 1977) 8

Keers and Co. vs. *American Steel and Pump Co.*, 234 F. Supp. 201 (S. D. N. Y. 1964) 8

Mifflin Energy Sources, Inc. vs. *Brooks*, 501 F. Supp. 334 (W.D. Pa. 1980) 11

Nelson vs. *Serwold*, 576 F. 2d 1332 (9th Cir. 1978), cert. denied 439 U. S. 970, 58 L. Ed. 2d 431, 99 S. Ct. 464 8

S.E.C. vs. *R. J. Allen & Assoc., Inc.*, 386 F. Supp. 866 (S. D. Fla. 1974) 8

PAGE

S.E.C. vs. *W. J. Howey Co.*, 328 U. S. 293 (1946) .. 10
Santa Fe Industries, Inc. vs. *Green*, 430 U. S. 462 (1977) 9
U.M.W. vs. *Gibbs*, 383 U. S. at 725. 13
United Housing Foundation vs. *Forman*, 421 U. S. 837 (1975) 11
Weaver vs. *Marine Bank*, 637 F. 2d 157 (3rd Cir. 1981) 14

Statutes

Securities Exchange Act of 1934, Section 10(b) (15 U.S.C. §78jb) 7
Securities and Exchange Commission, Rule 10b-5 (19 C.F.R. §240, 10b-5) 7
Securities Act of 1933, Section 2(1) (15 U.S.C. §77b(1)) 9
Securities Exchange Act of 1934, Section 3(a)(10) (15 U.S.C. §77c(a)(10)) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ZENITH RADIO CORPORATION, et al.,
Petitioners,

vs.

ROBERT EDWARD McGRATH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUMMARY OF REASONS FOR NOT GRANTING THE WRIT

I.

Petitioners do not question the jury's verdict of common law fraud and any discussion of the federal securities law here would be purely advisory.

II.

The securities questions raised here were not raised below and petitioners' argument here is theoretical and not based on the facts. There is no conflict between this and any other case.

III.

The authorities relied on by the courts below in finding a substantial federal question are also relied on by petitioners but petitioners disagree with the interpretation of the facts reached by the jury and court of appeals. This court should not review the record de novo.

IV.

The form of verdict here was agreed to by petitioners and is not a true "general" verdict. A consideration of the standard of reviewing general verdicts would have no general application.

STATEMENT OF THE CASE

The facts of this case are embodied in the opinion of the court of appeals. (Pet. App. 2a-5a) In short this is what happened: Zenith decided to acquire one hundred percent of the shares of Basford, including a minority interest owned by McGrath and his option to purchase additional shares. McGrath, a Harvard MBA, had worked sixteen years in business and had already been promised the position of Basford's chief executive officer. Zenith told McGrath that if he would sell his stock and surrender his option then they would make him president of their new subsidiary and provide him many other benefits. Prior to the consummation of the contract of purchase, Zenith and the other defendants discussed McGrath's termination, and they did not intend to fulfill these representations. McGrath was not so informed, but instead relied on Zenith's promises and agreed to the stock sale. He received nothing for giving up his option. After McGrath sold his stock, Zenith then fired him without cause. These actions destroyed McGrath's career.

As a reading of the opinion below reveals, petitioners' statement of the case is highly selective and sometimes distorted.

With regard to respondent McGrath's background and his hiring by Basford, petitioners have omitted the following relevant facts. McGrath was president of the distributing company by which he was employed prior to his hiring by Basford. (Tr. 73-75) The Basford representatives who interviewed McGrath repeatedly emphasized that Basford was looking for a chief executive officer and that, if hired, McGrath

would be the chief operating executive officer, have a substantial stock ownership, be in charge of long range planning and become president when Forni retired. (Tr. 81-82, 85-87, 388, 390, 395-396, 93, 811-812)

In January of 1972, Forni told McGrath that he didn't see any reason to change the April date for his retirement. (Tr. 114) In March, McGrath learned that in late May or early June Basford was going to be awarded a plaque for 25 years as a Zenith distributor and McGrath then spoke to Forni who indicated he still felt the same way about the date of his retirement. McGrath then suggested that Forni wait and retire when Basford got the plaque. (Tr. 123) During May, Forni told McGrath that, in view of the possible sale to Zenith at a price higher than Forni could get if he sold his stock through the Company, it didn't make sense for him to retire until after the sale. McGrath agreed. Forni hoped he could retire by September or October. (Tr. 157-158)

Petitioners incorrectly suggest that the agreement allowing McGrath to purchase additional Basford shares provided for such purchase only after three years of employment. (Pet. 3) Because McGrath desired to become a substantial owner in Basford, it was agreed that he would have the right to purchase 8,000 shares of stock within three years of beginning his employment as the shares became available from the company trust and, if insufficient shares became available during that three year period, Basford was obligated to make sufficient shares available within 90 days of the end of McGrath's third year of employment. (Tr. 91 and plf's ex. B)

Petitioners ignore the fact that during the extensive negotiations regarding the Zenith purchase of Basford considerable attention was given to the fate of the Basford employees. The Zenith negotiator, defendant Fisher, acknowledged that the employees greatly contributed to the strength and value of Basford and that, under Zenith ownership, Basford employees

would have expanded career opportunities and that Zenith wanted to keep the company intact. (Tr. 156-157, 347, 512-514) When he referred to "career opportunities," Fisher was referring to staying with the company after Zenith completed the transaction and his use of the term did not exclude McGrath. (Tr. 534-535)

Petitioners incorrectly suggest that McGrath created a complication in the Zenith purchase of Basford stock during his discussion with Fisher on July 13, 1972. (Pet. 4) The July 13 discussion between McGrath and Fisher was initiated by Zenith and arose out of Zenith's decision on July 12, 1972 that it was necessary to extinguish McGrath's option agreement to purchase additional shares. Fisher was designated to negotiate with McGrath regarding the option. (Tr. 610-612) The discussion between Fisher and McGrath is set out verbatim in the opinion below. (Pet. App. 3a-4a) It was Fisher who first suggested that nobody was hurt more or would give up more in the sale of Basford than McGrath because McGrath was going to waive the option to buy additional shares. It was also Fisher who said that McGrath was the "heir apparent." (Pet. App. 3a-4a)

Petitioners omit reference to the fact that later on July 13, 1972, despite specific inquiry to both Fisher and Forni by McGrath regarding the date of Forni's retirement and McGrath's succession to the presidency, both Fisher and Forni failed to disclose to McGrath Forni's earlier private revelation to Fisher that Forni had reservations about McGrath becoming president. (Tr. 180-183, 400, 403-404, 440-441, 454-455, 957-959)

Petitioners state that McGrath found a new position with Zenith's assistance. (Pet. 5) Petitioners ignore that McGrath's request that he be moved to another job with Zenith while looking for other employment was refused as was his request for the use of an office, telephone and some secretarial help to

type resumes and to put a better appearance on his termination. (Tr. 203-206 and 213-214) Petitioners' suggestion that Zenith assisted McGrath in obtaining new employment stems from McGrath's testimony that the Fleetwood interviewer independently checked with a personal friend who had recently joined Zenith without requesting references from the Zenith and Basford personnel involved in this transaction. (Tr. 246)

Petitioners state that McGrath's position with Fleetwood paid $42,000.00 per year. (Pet. 5) The evidence is that the salary was $36,000.00 and that there was supposed to be a bonus of $6,000.00, but that was never paid. (Tr. 247) Petitioners also note that the Fleetwood salary plus the unpaid bonus was more than McGrath earned with Basford. This overlooks the fact that McGrath's salary at Basford was as vice-president, but that the position which he was promised was the presidency. In fact, the income projected by McGrath's expert witness for a person employed as president of a company similar to Basford from the date of McGrath's termination to the trial was substantially the same as that received by Mr. Wood, the man who replaced Forni as Basford president at the time of McGrath's termination. (Tr. 453-456 and plf's exhibits I and N) It also ignores that McGrath accepted the Basford position at considerably less salary than he received at his previous position in expectation that he would ascend to the presidency. (Tr. 300)

REASONS FOR NOT GRANTING THE WRIT

I.

THE ONLY SUBSTANTIVE POINTS RAISED BY PETITIONERS ARE NOT DISPOSITIVE AND A DECISION FAVORABLE TO PETITIONERS ON THOSE POINTS WOULD NOT REQUIRE A REVERSAL.

This case presents no ground for review recognized under Supreme Court Rule 17. Petitioners assert that substantial federal securities law issues were wrongly decided by the court of appeals. These assertions are at odds with the holding of that court where it said:

> Because the jury's compensatory and punitive damage awards may have rested solely upon the common law fraud theory, which finds factual support in the record and as to which no error is preserved for review, *we need not consider whether the section 10(b) and Rule 10b-5 count could have sustained an award of compensatory damages* ... there being a totally adequate independent theory upon which the verdict may have rested. (Pet. App. A-21a, 22a) (emphasis added)

The petitioners ask this court to decide a case which the jury obviously decided on the basis of common law fraud under the pretext that the court of appeal's decision is at odds with decisions of this and other courts. No such decision was rendered below. The securities law issues raised by the petitioners are not dispositive of this case. Even if this court should rule in favor of petitioners' contentions, there could be no reversal.

II.

THE COURT OF APPEALS CORRECTLY INDICATED THAT THE FEDERAL SECURITIES LAWS ARE APPLICABLE TO THIS TRANSACTION.

In the court of appeals, the securities questions raised by petitioners were whether their misrepresentations to McGrath were "material" and "in connection with" the sale of his securities under Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. § 78jb) and Securities Exchange Commission Rule 10b-5 (17 C. F. R. § 240, 10b-5). (Brief of Appellants at 1). The court of appeals answered these questions affirmatively. In seeking a rehearing, petitioner then raised the questions of: (1) whether key employees could "obtain special benefits" for themselves as a result of the implications in the court of appeals decision and (2) whether a decision to give up a potential option supported a 10(b)5 claim. (Petition for rehearing at 8-10). The court of appeals found no such implications in its decision and said that since there were intentional, knowing and material misrepresentations "in connection with the actual sale of McGrath's securities there was no reason to also decide whether fraud in connection with the option might violate the federal securities laws. (Pet. App. 14a) Now petitioners—for the first time—claim that their misrepresentations were made "to a group of selling employee-shareholders." (Pet. i). This was not the theory of petitioners' defense at trial, the issue was neither considered at trial nor raised on appeal. No facts support this contention. There is no occasion here to answer the theoretical question.

As already noted, the federal securities issues are not despositive of the case. The court of appeals concluded that the jury found for McGrath on the common law fraud count and that the evidence supports that finding. (Pet. App. 21a, 22a) The common law fraud count has not been challenged in the

petition for writ of certiorari. However, as demonstrated below, even if the federal securities laws issues are considered, petitioners have raised no issue which requires consideration by this court.

Petitioner's contention that the opinion below transforms section 10(b) and Rule 10(b)-5 into a federal general fraud statute is predicated upon their erroneous assumption that these provisions are concerned only with fraud relating to the monetary value of the stock involved. This theory was not raised by the petitioners in either the district court or the court of appeals. As the opinion below indicates, petitioners' only challenge to the security fraud count was that their statements were not made "in connection with" a sale or purchase of a security and that the statements were not material. (Pet. App. 11a) Matters which have not been raised in the court of appeals are not considered on appeal to this court. *Adickes* vs. *S.H. Kress & Company,* 398 U. S. 144, 147 (1940).

In any event, there is no basis for petitioners narrow construction of Section 10(b) and Rule 10(b)5. Petitioners note that this court has not so limited those provisions. (Pet. 11) Lower courts have not so restricted this remedy. Examples of fraud going to the decision to buy or sell that had nothing to do with the fairness of the sale price are: making the false promise to share corporate opportunities, *Keers and Co.* vs. *American Steel and Pump Co.,* 234 F. Supp. 201 (S. D. N. Y. 1964); concealing repurchase agreement with other buyers, *Hidell* vs. *International Diversified Investments,* 520 F. 2d 529 (7th Cir. 1977); misrepresenting the magnitude of the risk taken, *S.E.C.* vs. *R. J. Allen & Assoc., Inc.,* 386 F. Supp. 866 (S. D. Fla. 1974); not disclosing the existence and long range plans of a control group, *Nelsen* vs. *Serwold,* 576 F. 2d 1332 (9th Cir. 1978) cert. den. 439 U. S. 970, 58 L. Ed. 2d 431, 99 S. Ct. 464; not disclosing the real source of purchasing funds, *A. J. White & Co.* vs. *S.E.C.,* 556 F. 2d 619 (1st Cir. 1977), cert. den. 434 U. S. 969, 54 L. Ed. 2d 457, 98 S. Ct. 516.

Petitioners' contention ignores the fact that, while price is often a prime factor, there are many factors which can bear on an investor's decision to buy or sell a particular security in a particular context. It is fraudulent representations with respect to any of these factors with which Section 10(b) is concerned. This is demonstrated by the language on which petitioners rely which refers to any "omission, misstatement or fraudulent course of conduct that would have impeded a shareholder's judgment of the value of the offer." (Pet. 10, quoting *Santa Fe Industries, Inc.* vs. *Green,* 430 U. S. 462, 469 (1977)). As the cases noted above indicate, "the value of the offer" can depend on many factors in addition to price. In the case of an employee owned company such as Basford, Zenith's intention regarding the retention of existing employees was such a factor.

Petitioners contend that *Blue Chip Stamps* vs. *Manor Drug Stores,* 421 U. S. 723 (1975) deprives McGrath of standing under the securities laws because his stock option to purchase additional Basford shares made him a mere potential purchaser of corporate shares. (Pet. 19-20) *Blue Chip* is not applicable. The *Blue Chip* plaintiffs did not purchase or sell a security and did not possess a contractual right to acquire a security. Instead, they claimed they refrained from buying or selling securities because of fraud. McGrath sold his Basford stock and waived his option to purchase additional stock.

Petitioners' tortured reading of *Blue Chip Stamps* would literally amend the 1933 Securities Act and the 1934 Securities Exchange Act. Both statutes specifically protect options, acknowledging that a contractual right to acquire stock or other securities at a predetermined price is commercially recognized as a security. Section 2(1) of the Securities Act of 1933 (15 U. S. C. § 77b(1)) and Section 3(a)(10) of the Securities Exchange Act of 1934 (15 U. S. C. § 77c(a)(10)). McGrath's

option was not "potential" but the method agreed on to ensure McGrath's right to become a substantial owner despite the fact that no more stock was available at the time he was hired. (Tr. 91)

What *Blue Chip Stamps* did, in ratifying the rule of *Birnbaum* vs. *Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir.), cert. denied 343 U. S. 956 (1952), was to hold that one must be a *purchaser* or *seller* of a security to sue for violation of the Rule 10(b)5 prohibition on fraud "in connection with the *purchase* or *sale* of a security." *Blue Chip Stamp* nowhere says that an option is not a security; it says only that one who fails to buy or sell because of fraud has no standing to sue under Rule 10(b)5. The policy argument against giving standing to one who claims that, but for fraud, he would have bought or sold is manifest: such claims are speculative and unreliable at best. The relinquished "right" of the *Blue Chip* plaintiff to buy was not contractual, like McGrath's option, nor was that "right" sold for value to the defendant.

It is unnecessary to resort to the economic realities test to determine that the securities laws apply to this transaction. (Pet. 21-23) This case involves the sale of stock in a corporation and the waiver of an option to purchase stock in a corporation. Both stock and the right to purchase stock are specifically covered by Section 2(1) of the Securities Act of 1933. 15 U. S. C. § 77b(1). Zenith was purchasing the stock of a corporation which was held by many different shareholders, including McGrath.

The economic realities test is used to distinguish between primarily investment or primarily commercial activities in those cases where the sale involves an item not fitting the commonly accepted security mold. For instance, in *Securities and Exchange Commission* vs. *W.J. Howey Co.*, 328 U. S. 293 (1946)

the sale involved units of land in a Florida citrus grove by deed coupled with a management contract. This was clearly not stock in a corporation, but the question was whether it constituted an investment contract under the Securities Act of 1933. Similarly, in *United Housing Foundation* vs. *Forman,* 421 U. S. 837 (1975) the transaction was the acquisition of a residential apartment in a state subsidized cooperative. To acquire such an apartment the purchaser was required to buy 18 shares of stock for each room desired. The purchase of the stock enabled the purchaser to occupy the apartment and the stock price was a recoverable deposit on the apartment.

The distinction between cases involving transactions which appear to have commercial attributes but are given "securities" labels and cases such as this involving a contract to purchase stock of a corporation is enunciated in *Mifflin* vs. *Brooks,* 501 F. Supp. 334 (W. D. Pa. 1980). The latter are clearly subject to the securities laws.

The fact that Zenith purchased one hundred percent of the stock of Basford does not remove this case from the application of the securities laws. As the court of appeals noted (Pet. App. 2b), this case is distinguishable from those cases in which the stock in a corporation is transferred as an incident of the sale of a business. Significantly, the cases cited by petitioners (*Bula* vs. *Mansfield,* CCH Fed. Sec. L. Rep. Para. 96,964 (D. Colo. 1977); *Chandler* vs. *Kew, Inc.,* CCH Fed. Sec. L. Rep. Para. 96,966 (10th Cir. 1977); and *Fredriksen* vs. *Poloway,* 637 F. 2d 1147 (7th Cir.) Cert. Denied, ____ U. S. ____, 49 U. S. L. W. 3882 (May 26, 1981)) all concern asset acquisitions and not a transaction where the parties chose to sell and buy securities, including the rights to receive dividends, negotiability, voting rights, and the potential of appreciation in value. The court of appeals here, which also decided *Fredriksen,* held that *Fredriksen* did not require a contrary result in this case. The court correctly pointed out that in *Fredriksen* the stock was trans-

ferred only "as an incident of" the sale of the assets. (Pet. App. 1b-2b) Here the purchase and sale of Basford's stock was the essence of the transaction.

By arguing that the federal securities fraud provisions are not applicable when a purchaser acquires 100 percent of a target company's stock, petitioners apparently concede the law's application where less than 100 percent of a target company is purchased. Petitioners offer no logical reason why fraud may be committed in the purchase of less than 100 percent of the stock, but not where the target company's entire stock is acquired. As the court of appeals noted, the securities laws cannot be circumvented by arranging to purchase all of a corporation's shares at one time. (Pet. App. 2b)

III.

A SUBSTANTIAL FEDERAL QUESTION EXISTS AND THE LOWER COURTS PROPERLY EXERCISED PENDANT JURISDICTION.

The existence of a federal question and the propriety of hearing the pendent state claims was thoroughly considered by the court of appeals in terms of the tests defined by this court. (Pet. App. 6a-7a) Petitioners refer to the same authorities relied on by the court of appeals to find a substantial federal question, but never recite the test those authorities apply in determining the existence of such a question. (Pet. 23-26) A substantial federal question exists in the absence of controlling authority establishing beyond rational argument that there is no federal claim. *Hagans* vs. *Levine*, 415 U. S. 528, 536 (1974) noted that where claims are "so attenuated and unsubstantial as to be absolutely devoid of merit" they may be dismissed for failure to present a "substantial federal question."

A federal claim may only be declared insubstantial where its unsoundness "so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for

the inference that the question sought to be raised can be the subject of controversy." *Hagans,* 415 U. S. at 537. Petitioners have cited no such case here, just as they failed to cite such a case to either the district court or the court of appeals. Petitioners only restate the facts in a light most favorable to themselves.

The fact that McGrath's federal claim is not wholly insubstantial or obviously frivolous is demonstrated by the fact that it survived petitioner's motion for summary judgment (R. Doc. 20 and 40), their motions for directed verdicts (Tr. 695 and 1085), the jury's deliberations (R. Doc. 46), petitioners' post-trial motion (R. Doc. 51) and the decision of the court of appeals (App. 6a-7a).

The exercise of pendant jurisdiction over state law claims in this case was also proper. The Federal Rules of Civil Procedure provide for the trial of *all* actions between the parties in a single action (Fed. R. Civ. P. 18). The claims McGrath asserted arise out of the same operative facts, which gives the court jurisdictional power. *U.M.W.* vs. *Gibbs,* 383 U. S. at 725 (1966). While petitioners argue that the court improperly exercised its discretion, they do not discuss the many factors involved in the exercise of such jurisdiction. In *U.M.W.* vs. *Gibbs,* 383 U. S. at 725, the Court recognized that jurisdiction, in the sense of judicial power, exists whenever there is an Article III claim and it and the state claim arise out of a single factual transaction. The court went on to detail the various considerations addressed to the court's discretion in deciding whether or not to hear pendant state law claims. 383 U. S. at 726-727. Among the factors justifying retention of the state claims are the length of time spent in district court litigation, the unity of factual issues with the federal claim, and the exclusivity of federal jurisdiction over the securities law claim.

After noting that federal jurisdiction over Section 10(b) claims is exclusive and the fact that, because state courts cannot enforce Section 10(b), the Supreme Court lacks appellate jurisdiction to consider, when a state trial is finally concluded, whether the underlying transaction offended national policy, the court in *Weaver* vs. *Marine Bank*, 637 F. 2d 157, 165 (3rd Cir. 1981) said:

> The federal exclusivity of the section 10(b) remedy is, moreover, a compelling reason why pendent state law claims ought to be heard in the federal court as well, even in states where state law would afford as much or more relief. See, *Cotler* vs. *Inter-County Orthopaedic Association, P.A.*, 526 F. 2d 537 (3d Cor. 1975). Thus we must also reverse the district court's dismissal of the pendent state law claims, so that the trial court may reconsider whether their trial should be held in the same tribunal which must consider the section 10(b) claim.

See also *Hanraty* vs. *Ostertag*, 470 F. 2d 1069, 1099 (10th Cir. 1973) holding pendent jurisdiction properly exercised over state breach of contract and fraud claims in a section 10(b) action.

IV.

THE STANDARD FOR REVIEWING GENERAL VERDICTS CANNOT BE RESOLVED ON THE FACTS OF THIS CASE.

In this court, petitioners express concern over the standard of review to be applied to general verdicts. Not only did petitioners not request special verdicts at the time of trial, but no such issue was raised by them in the court of appeals until the filing of their petition for rehearing. By failing to request special verdicts, petitioners have waived their right to complain on appeal. *Dixson* vs. *Newsweek, Inc.*, 562 F. 2d 626, 631 (10th Cir. 1977).

Even if the standard for reviewing general verdicts presented a procedural problem warranting resolution by this Court, the present case does not provide the vehicle for accomplishing this. The jury's verdict (R. Doc. 46) was not a typical general verdict. The verdict awarded compensatory damages in the amount of $1,000,000.00 against all defendants, but awarded punitive damages in differing amounts against the four defendants.

As the opinion below notes:

> Presuming, as we must on appellate review, that the jury followed its instructions, it is clear that the compensatory damage award rendered against all defendants could not have been predicated solely upon the contract count . . . Moreover, . . . the jury [was] properly charged that such [punitive] damages could be imposed in this case only if the defendants were found liable for common law fraud . . . the jury's compensatory and punitive damage awards may have rested solely upon the common law fraud theory, which finds factual support in the record . . . (Pet. App. 21a, footnote omitted)

Thus, because of the itemized verdict on compensatory and punitive damages, this is not a general verdict in the usual sense. The jury found for McGrath on a count which is not challenged by petitioners. Consideration of the standard of review of general verdicts would be inappropriate and not dispositive of this case.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

D. KENDALL GRIFFITH,
WILLIAM J. HOLLOWAY,
MICHAEL J. LEECH,
69 West Washington Street
Chicago, IL 60602
(312) 630-4400
Hinshaw, Culbertson, Moelmann,
Hoban & Fuller

FRANK M. BRADY,
MARK T. DUNN,
600 Peoples Bank Building
Bloomington, IL 61701
(309)828-6241
Dunn, Brady, Ulbrich, Morel,
Kombrink & Hundman
Attorneys for Robert Edward McGrath, Plaintiff-Respondent